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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963.

No. 456

FRED WAYNE ETCHEVERRY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

PETITION FOR REHEARING

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TO THE SUPREME COURT OF THE UNITED STATES:

Comes now the petitioner, by his attorney, and files this, his Petition for Rehearing of the Order heretofore entered by this Court denying his petition for writ of certiorari.

Petitioner respectfully urges the Court to reconsider its action for the following reasons:

Subsequent to the filing of the Petition for a Writ of Certiorari the United States Court of Appeals for the Sec-

ond Circuit, deciding a Selective Service case by a unanimous opinion, went back 20 years to its then-pronounced definition of religion.

In doing this the Second Circuit repudiated the clear Congressional intent of the 1948 and subsequent draft laws on this subject. In the 1948 Draft Act Congress had repudiated the Second Circuit's definition of religion (in the draft cases of *United States* v. *Kauten*, 133 F.2d 703 (2 Cir., 1943), *U. S. ex rel. Phillips* v. *Downer*, 135 F.2d 521 (2 Cir., 1943), *U. S. ex rel. Reel* v. *Badt*, 141 F.2d 845 (2 Cir., 1944) and had adopted the Ninth Circuit's definition in *Berman* v. *United States*, 156 F.2d 377 (9 Cir., 1946).

On November 22, 1963 (*Jakobson* v. *United States*, ... F.2d ....., No. 28137) the Second Circuit reverted to its *Kauten* definition because of its interpretation of this Court's decisions of the last past few years, specifying *Speiser* v. *Randall*, 357 U.S. 513 (1958), *Torcaso* v. *Watkins*, 367 U.S. 488 (1961) and Abington School District in *Schempp*, 374 U.S. 204 (1963). This is also your petitioner's interpretation.

Legal writers also agree with this new construction, and in fact they were relied on by the Second Circuit. Francis J. Conklin, S. J., Professor of Law at Gonzaga University, writing in the Georgetown Law Journal, 51:252, 1963 concludes, concerning *Torcaso*: ". . . it casts considerable doubt upon the constitutionality of the ministerial exemption provision in that same [Selective Service law] statute." [253]. Nevertheless, appellee in the Jakobson case (the government) is filing a petition for a writ of certiorari. Further, we have learned that similar cases are pending in the Seventh Circuit (*Stollberg* v. *U. S. A.*) and in other circuits (Seeger in Second and Lawson in the Third) and that the appellants in these cases, if defeated, plan to file petitions for writs of certiorari.

It is evident, therefore, that your petitioner, Etcheverry, poses a question of wide interest and importance and that his petition for rehearing has this additional reason for being reconsidered.

Nor will any injustice be done the government by a continuation of petitioner Etcheverry on bail: the trial judge, a judge who has sent one hundred draft law defendants to prison, upon learning that Etcheverry's bond was $250.00 said "His bail on appeal will be $1.00." During sentencing this judge said of Etcheverry, "I admire you."

The appellant is a member of a relatively small minority, the Quakers, those who believe that all men stand equal before God. The appellant made his beliefs clear (Government Ex., page 30) that a clergy class represents a double standard of morality. Congress is forbidden by the First Amendment to pass any laws which establish religion. While the law of any land will always reflect its heritage and culture, which can hardly be separated from its major religions, the law once written must apply to all regardless of religious "status" or affiliation.

While the non-ministerial faiths never constituted a majority in the United States at one time (late colonial) they were very influential. Meetings were held to seek God's guidance. They believe that divine contact was so personal and intense that many had convulsions which caused the various groups to be called "Ranters," "Shakers," "Jumpers," "Rollers", and "Quakers". While some of these groups had preachers they were not ordained or paid and were always open to arguments. "The great awakening" as many historians have called it played an important role in the realization of democracy. The concept that all men are equal before God not only led to the idea of not having a clergy but led the Quakers to denounce

slavery. While many ministers teach segregation no non-ministerial faith is segregated. Most are non-ceremonial. Some like the Quakers feel that God "speaks to one's own condition." They all believe that religious experience does not come out of a vacuum, but from fellow members that must meet the same business world they have to meet.

When a congressman proposes a law he is forbidden to ask in the law for preferential treatment for his own faith or that of his constituency. Most congressmen and their constituency have ministerial faiths. It may be difficult for a congressman to imagine a member of the clergy in combat or combatant training, but the First Amendment of the Constitution makes it mandatory for all congressmen to imagine the effects of their legislation on all faiths because they are not impowered to exempt any from their Acts.

Now it might have been that the congressmen having considered the effects of their legislative acts on their own clergymen would have passed a conscription act, even if it meant that some clergymen would either have to go to prison or violate their sacred vows, but they did not. It may be an unpleasant task for congressmen to consider legislation that might endanger their clergy's morals, but this court should so direct; the First Amendment demands it. The First Amendment is directed solely against acts of Congress. It has no other thrust.

It would certainly be unconstitutional to tax the appellant to pay the clergy's salary. If military service is an obligation then to ask the appellant to serve while a clergyman is exempted is to ask the appellant to shoulder a rifle not only for his own obligation but for another man, so that man can be free to teach and disseminate ideas which are not only opposed to appellant's basic beliefs but

are often considered by him to be despicable and depraved. *Everson* v. *Board of Education*, 1947, 330 U.S. 1.

Let us assume for an *argumentum reductio ad absurdum* that the power of peacetime conscription is given to the Federal Government by the constitution. Where in the constitution is the term of peacetime conscription limited? There being no limitation what is to limit the term of service to the six months Daniel Webster feared, the one year Robert Taft feared, or the two years now in effect? What is to prevent the term of service from becoming five years, ten years, or life? Conscription in time of war has been limited to the "duration." It might be argued that congressional and judicial prudence limit the term of service, but it is because of the lack of trust in congressional and judicial prudence that we have a document of civil guarantees. Therefore, to assume that a document can contain a provision permitting it to be subverted by the very forces it was designed to guard against is absurd.

WHEREFORE, it is respectfully urged that the denial of the writ be reconsidered.

J. B. TIETZ,
Attorney for Petitioner.

December 27, 1963.

CERTIFICATE OF COUNSEL.

This Petition for Rehearing is filed in good faith and not for the purpose of delay.

J. B. TIETZ
Attorney for Petitioner.